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BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

HEARL K. CLAY and BDZ DEVELOPERS,)

Appellants,)

v.)

STATE OF WASHINGTON, DEPARTMENT)
OF NATURAL RESOURCES and)
SNOHOMISH COUNTY,)

Respondents.)

FPAB No. 90-3

PARTIAL DISMISSAL
OF FIRST AMENDED
PETITION FOR DECLARATORY
RULING

The following issues presented by the First Amended Petition for Declaratory Ruling are dismissed due to the lack of consent of all necessary parties, which is required by RCW 34.05.240(7):

1. Does Snohomish County have the authority to require BDZ to obtain a Forest Practices Permit for the forest practice activities conducted by Clay without such a permit?

2. Does Snohomish County have the authority to request DNR to impose a six year moratorium on development of the subject property as a condition to approval of a Forest Practices Application for the forest practice activities conducted by Clay without such a permit?

3. Does the DNR and/or the FPAB have the authority to impose a six year moratorium on development of the subject property as requested in Snohomish County Council Motion 90-337?

PARTIAL DISMISSAL OF FIRST
AMENDED PETITION FOR
DECLARATORY RULING
FPAB No. 90-3

1 4. If the DNR and/or the FPAB have the authority to impose a six
2 year moratorium on development of the property, should they impose
3 such a moratorium in this case?

4 5. Does Snohomish County have the authority to request DNR to
5 impose conditions relating to mitigation and the EIS process as a
6 condition to approval of a Forest Practices Application for the forest
7 practice activities conducted by Clay without such a permit?

8 6. Does the DNR and/or FPAB have the authority to impose
9 conditions relating to mitigation and the EIS process on development
10 of the subject property as requested in Snohomish County Council
11 Motion 90-337?

12 7. If the DNR and/or the FPAB have the authority to impose
13 conditions relating to mitigation and EIS process, should they impose
14 such conditions in this case?

15 8. If BDZ is required to obtain a Forest Practices Permit as
16 required in Snohomish County Council Motion 90-337, is the SEPA review
17 (including the EIS and all conditions and mitigation) required as a
18 condition of the Forest Practices Permit identical to the SEPA review
19 required as a condition of the preliminary plat in Snohomish County
20 File No. ZA8810459 such that only a single review is required?

21 9. If BDZ is required to obtain a Forest Practices Permit for
22 the forest practice activities of Clay, and said Forest Practices
23 Permit is conditioned on a six year moratorium on development of the
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1 subject property as required in Snohomish County Council Motion
2 90-337, from what date does the six year moratorium commence to run?

3 10. Do the conditions requested by Snohomish County violate
4 BDZ's constitution rights, including, but not limited to the rights of
5 equal protection and due process of law?

6 SO ORDERED.

7 DONE this 3rd day of June, 1991.

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9 FOREST PRACTICES APPEALS BOARD

10 Claudia K. Craig
11 CLAUDIA K. CRAIG, Chairperson

12 Norman L. Winn
13 NORMAN L. WINN, Member

14 Martin R. Kaatz
15 DR. MARTIN R. KAATZ, Member

16 William A. Harrison
17 WILLIAM A. HARRISON
18 Administrative Appeals Judge
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BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

HEARL L. CLAY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF NATURAL RESOURCES and
SNOHOMISH COUNTY,

Respondents.

FPAB No 90-3

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In the Matter of a Petition for
Declaratory Ruling by,

BDZ DEVELOPERS, INC., a
Washington corporation,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT
OF NATURAL RESOURCES; SNOHOMISH
COUNTY; and HEARL K. CLAY and
ORPHA L. CLAY,

Respondents.

THIS MATTER came on for hearing before the Forest Practices Appeals Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Claudia K. Craig, Chair, Norman L. Winn, and Dr. Martin R. Kaatz.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB No. 90-3

1 These matters involved: (1) an appeal by Hearl K. Clay
2 (hereinafter referred to as "Clay" or the "the Clays" of the
3 Department of Natural Resources' (hereinafter referred to as "DNR")
4 denial of their forest practices application at the request of
5 Snohomish County; and (2) a petition for declaratory ruling submitted
6 by BDZ Developers, Inc. (hereinafter referred to as "BDZ"). These two
7 proceedings were consolidated for hearing by order of Judge Harrison
8 on May 17, 1991.

9 The appearances were as follows:

10 1. The Clays were represented by R. Scott Hutchison and James R.
11 Johnston, attorneys at law;

12 2. DNR was represented by Kathryn L. Gerla and Cheryl Nielson,
13 Assistant Attorneys General;

14 3. Snohomish County was represented by Tracy M. Goodwin and
15 Barbara J. Gustafson, Deputy Prosecuting Attorneys;

16 4. BDZ was represented by Mark W. Stowe and John D. Macklin,
17 attorneys at law.

18 The hearing was conducted at Seattle on July 18 and 19, 1991.
19 Appellants elected to have an informal hearing pursuant to
20 RCW 76.09.230. Twelve witnesses were sworn and testified. Exhibits
21 were examined. The Board viewed the site in the company of Judge
22 Harrison and the parties. From the testimony heard and exhibits
23 examined, the Forest Practices Appeals Board makes the following:
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FINDINGS OF FACT

1. This case involves property located in unincorporated Snohomish County between the cities of Lynnwood and Brier. The property is approximately 5.2 acres in size. It is located in a rapidly urbanizing area of the County.

2. Through the southeast corner of the property runs Golde Creek, which is classified under the Forest Practices Regulations as Type 3 water. Running through the middle of the property in a roughly east-west direction is a drainage that would be classified under the Forest Practices Regulations as an Intermittent Type 5 water. It drains towards Golde Creek.

3. The property was acquired by the Clays in late 1987. The trees on the property were primarily alder, with scattered western red cedar, Douglas Fir, and Western Hemlock, as well as other species.

4. In May 1988, the Clays obtained a building permit from Snohomish County to construct a single family residence on the property. To facilitate that construction and to clear the property for use as a pasture, the Clays had part of the property cleared and the stumps removed in the summer of 1988.

5. At the time of the clearing, there was approximately 17,000 board feet of timber on the property. Approximately 8,000 board feet was cut and removed at the direction of the Clays. The balance of the

1 volume was left in a riparian management zone along the west side of
2 Golde Creek, in the untouched area east of Golde Creek and in other
3 scattered conifers left throughout the balance of the property.

4 6. The approximately 8,000 board feet removed was suitable for
5 the production of pulp or firewood. However, the amount of timber
6 removed was not of sufficient value to cover all the costs of harvest
7 and transportation to market. Therefore, the stand removed did not
8 constitute a merchantable stand of timber.

9 7. In addition, in light of the state leave requirements along
10 Golde Creek, it is improbable that the site at any time had 17,000
11 board feet located on the property available for removal. After
12 deducting for the likely required strips, the value of the trees which
13 could have been removed from the property was not of sufficient value
14 to cover the costs of harvest and transportation to market.

15 8. As of the summer of 1988, (nor in the present or in the
16 foreseeable future), the property was not capable of supporting a
17 merchantable stand of timber, given the size of the property, the
18 areas that are in creeks, wetlands, or that otherwise might require
19 the leaving of trees under state regulations, and the rapidly
20 urbanizing character of the land in the vicinity and on adjacent sites.

21 9. At the time the property was cleared, the Clays did not
22 obtain a forest practices permit. Following the clearing of the
23 property, the Clays ultimately sold the property to BDZ on or about
24 April 6, 1990.

1 10. It was and is BDZ's plan to subdivide and develop the property
2 for more than one homesite. In furtherance of its plan, BDZ pursued a
3 plat application with Snohomish County. In connection with that plat
4 application, an issue was raised in late 1989 whether the Clays should
5 have obtained an approved forest practices application in connection
6 with their clearing activities. In January 1990, Snohomish County
7 wrote to DNR requesting that a forest practices application be
8 required on account of the clearing of the property in the summer of
9 1988. At BDZ's request, the Clays submitted a forest practices
10 application with DNR on January 16, 1990. It was assigned Application
11 No. FP1911565.

12 11. On February 6, 1990, Snohomish County wrote to DNR with a
13 recommendation that DNR deny the Clay's application. DNR treated
14 Snohomish County's letter as an objection under RCW 76.09.050(6) and
15 (7). Among the grounds for denial that were cited in Snohomish
16 County's letter was the fact that the SEPA process in BDZ's plat
17 application was not yet completed, and that a determination of
18 significance had been issued by Snohomish County as lead agency for
19 BDZ's proposal.

20 12. On February 15, 1990, DNR denied the Clays' application.
21 This appeal by the Clays followed. The Clays' appeal raises two
22 issues which are set forth below.
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13. Following issuance of the determination of significance, BDZ commenced litigation in Snohomish County Superior Court. After Superior Court proceedings were stayed, BDZ filed the declaratory petition with this Board pursuant to RCW 34.05.240. On June 3, 1991, this Board dismissed all but two of the issues raised in BDZ's petition. Those two issues are set forth below.

14. Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

ISSUES

The Board identifies the following to be decided herein.

The issues raised by the Clays are:

- A. Does the Forest Practices Act require that BDZ obtain a forest practices permit for activities conducted by Clay as the prior owner of the property without having obtained such a permit?
- B. Does the DNR and/or this Board have the authority to require BDZ to obtain a forest practices permit for the activities conducted by Clay without such a permit?

The two remaining issues raised by BDZ's petition are:

- C. Was the DNR's denial of the Clays' forest practices application unwarranted due to Snohomish County's failure to specify its objections pursuant to RCW 76.09.050(6) and (7)?

1 D. Did the Clays conduct clearing activities during their
2 ownership of the property which required a forest
3 practices permit?

4 From the foregoing Findings of Fact, the Board makes these

5 CONCLUSIONS OF LAW

6 1. This Board has jurisdiction over the Clay appeal, and the
7 foregoing two issues in the BDZ petition, pursuant to RCW
8 76.09.220(8)(a) and RCW 34.05.240, respectively.

9 Turning first to BDZ's petition, the Board concludes as follows:

10 2. BDZ is required to obtain a forest practices permit for
11 activities conducted by Clay as prior owner of the property to the
12 extent that those activities in turn required a forest practices
13 permit. The obligation to obtain an approved permit runs with the
14 land. Neither the term "forest landowner" in the Forest Practices Act
15 (see RCW 76.09.020(7)) nor any provision in that Act refers to the
16 particular landowner at the time the forest practices were conducted,
17 the landowner at the time the application is filed, or the landowner
18 at any other point in time. Rather, the term landowner applies
19 without limitation to include subsequent landowners like BDZ.

20 3. Further, the DNR has the authority to require that a
21 subsequent purchaser of land such as BDZ obtain a forest practices
22 permit for forest practices conducted by the prior landowner. This
23 authority exists by virtue of RCW 76.09.090 which grants DNR authority
24 to issue notices to comply in order to enforce the Forest Practices
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1 Act. Such a notice can be issued to the landowner. The reference in
2 RCW 76.09.090(3) to "operator" is not significant, since an
3 application, no matter who files it, must be signed by the landowner
4 or accompanied by a consent form signed by the landowner. See, RCW
5 76.09.060 and WAC 222-20-010(4). See also -010(3). Thus, when a
6 notice to comply warrants the requirement of a submittal of an
7 application, DNR can issue such notice to the landowner.

8 Turning to the Clay appeal, the Board concludes as follows:

9 4. DNR's disapproval of Clays' application was warranted under
10 the Forest Practices Act. The reference in Snohomish County's
11 February 6, 1990, letter to the determination of significance issued
12 and the ongoing SEPA review constitutes a sufficient objection under
13 RCW 76.09.050(6) and (7) to an application for a conversion. The
14 Forest Practices Act contemplates compliance with the Environmental
15 Policy Act, in particular where Class IV-General applications are
16 involved. The determination of significance issued by the County in
17 this case is sufficient to warrant the denial of the application by
18 DNR. In reaching this conclusion, the Board says nothing concerning
19 the propriety of the determination of significance. In this case it
20 is sufficient that DNR received communication from the County
21 indicating that a determination of significance had been issued.

22 5. A forest practices permit is only required when a forest
23 practice is conducted. RCW 76.09.050(2). A forest practice is an
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1 activity conducted on or directly pertaining to forest land and
2 relating to growing, harvesting, or processing timber. RCW
3 76.09.020(8); WAC 222-16-010(21). Forest land is all land which is
4 capable of supporting a merchantable stand of timber and is not being
5 actively used for a use which is incompatible with timber growing.
6 RCW 76.09.020(6); WAC 222-16-010(19).

7 6. The definition of forest land leads the Board to the question
8 of whether this site was capable, at the time of harvest, at present,
9 or in the future, of supporting a merchantable stand of timber. Under
10 WAC 222-16-010(28), a merchantable stand of timber means a stand of
11 trees that will yield logs and/or fiber suitable in size and quantity
12 for the production of lumber, plywood, pulp, and other forest
13 products, and of sufficient value to at least cover all the costs of
14 harvesting and transportation to available markets. Based on the
15 findings, and in accordance with the conclusions in No. 5, the Board
16 concludes that the property in this case did not support a
17 merchantable stand of timber at the time of harvest. The Board also
18 concludes that the parcel is not capable of supporting a merchantable
19 stand now or in the foreseeable future. In reaching these
20 conclusions, the Board notes first that the land is of 5.2 acres in
21 size, and secondly, that the land is reduced by the wetlands, creeks,
22 and other areas that might require the leaving of trees. The Board
23 also notes the character of land use in the vicinity and on adjacent
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1 sites which indicates a rapidly urbanizing area. Thus, the trees
2 removed by the Clays did not constitute a merchantable stand of
3 timber. Accordingly, the application filed by Mr. Clay was not
4 necessary as the Forest Practices Act does not require a permit for
5 the activity conducted by Mr. Clay on this site.

6 7. We emphasize that this decision is based upon the particular
7 facts of this case. This is a very close case, and we in no way
8 criticize the actions of the DNR in making the judgment it did.

9 8. Any Finding of Fact deemed to be a Conclusion of Law is
10 hereby adopted as such.

11 Based on these Conclusions of Law, the Board enters this
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2. The DNR and/or the FPAB have the authority to require a subsequent purchaser of land to obtain a forest practices permit for the activities conducted by a prior owner of the property without such a permit.

4. Clays did not conduct clearing activities during their ownership of the property which required a forest practices permit. Accordingly, BDZ cannot be required to obtain a forest practices permit in this instance.

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DONE THIS 15th day of August, 1991.

FOREST PRACTICES APPEALS BOARD

Claudia K. Craig
Claudia K. Craig, Chairman

Norman L. Winn
Norman L. Winn, Member

Dr. Martin R. Kaatz
Dr. Martin R. Kaatz, Member

William A. Harrison
William A. Harrison
Administrative Law Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB No. 90-3